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No. 99-699

IN THE
SUPREME COURT OF THE UNITED STATES

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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INTEREST OF THE *AMICUS CURIAE*

Agudath Israel of America is a national Orthodox Jewish organization with constituents, and constituent religious bodies, across the United States. Many of Agudath Israel's

constituent congregations and other Orthodox Jewish religious bodies, as well as Agudath Israel itself, sponsor youth programs. Some of these programs are religious in nature, some are social, some educational, some recreational – but all of them are under control of a religious denomination whose attitude toward homosexual conduct is shaped by the biblical description of such conduct as "*to'eivah*", an abomination (*Leviticus* 20:13). Further, all of them would regard a homosexual activist as an inappropriate role model for children under his leadership and care.

Our interest in this case is substantial – for while this particular dispute may not involve a "bona fide religious or sectarian institution," 734 A. 2d at 1217,* it could well be that the long term impact of the decision below, if it is allowed to stand, will be felt most acutely in traditional religious communities like ours. We respectfully make this *amicus curiae* presentation, upon the consent of the parties, to expand upon why this is so.

The starting point of our concern is the current state of free exercise jurisprudence. In the aftermath of this Court's rulings in *Employment Division, Department of Human Resources of Oregon* v. *Smith,* 494 U.S. 872 (1990) (positing that a religious practice that is indirectly burdened by government enjoys no First Amendment free exercise protection), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act, Congress' effort to respond to *Smith* by establishing a statutory compelling interest standard for indirect burdens on religious exercise), religious practitioners are especially vulnerable to anti-discrimination provisions that conflict with their religious tenets. Civil rights laws are, after all, laws of general applicability, and the burdens they may impose on religious

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* All citations to the decision below are to *Dale* v. *Boy Scouts of America*, 734 A. 2d 1192 (N.J. 1999).

individuals or organizations are only indirect. The free exercise clause thus offers scant comfort to the person or entity whose faith demands that he or it engage in conduct that in the eyes of secular law constitutes unlawful discrimination.

Comfort, if it is to be had, will often come in the form of legislation expressly exempting certain types of religious practitioners from generally applicable anti-discrimination provisions. *See Employment Division* v. *Smith, supra,* 494 U.S. at 890. However, such exemption provisions are by no means universal features of all anti-discrimination laws; *see, e.g., Gay Rights Coalition* v. *Georgetown University Law Center*, 536 A.2d 1 (D.C. App. 1987). Some legislative bodies, apparently, are not prepared to grant religious entities the authority to practice their faith in a manner that would infringe on the civil rights of others. Indeed, current congressional efforts to enact the Religious Liberty Protection Act, a federal statute designed to restore the free exercise compelling interest test in a manner consistent with this Court's decisions in *City of Boerne, supra,* are now enmeshed in fierce debate over whether the law should extend to conflicts that may arise between civil rights and religious practice. (*See* Jacobson, *A Coalition With a Liberal-Leave Policy*, The National Journal (Oct. 30, 1999).)

Moreover, even where a legislature does deem it appropriate to exempt religious bodies from anti-discrimination laws, the exemption is often narrowly drawn and narrowly construed. The instant case is a good example. New Jersey's Law Against Discrimination exempts "educational facilit[ies] operated or maintained by a bona fide religious or sectarian institution." N.J.S.A. 10:5-5l. As determined by the court below, 734 A.2d at 1217 & n.10, Boy Scouts of America does not fit the category of an "educational facility" – despite the Boy Scouts' close affiliation with public schools and school-affiliated groups, described in detail at 734 A.2d at 1212-13; and despite the organization's express

purpose of "teach[ing]" its members "patriotism, courage, self-reliance and kindred virtues", *id.* at 1202. Nor does it fit the category of a "bona fide religious or sectarian institution" – despite a scout's Oath "to do [his] duty to G-d" and the Scout Law that requires a scout to be "reverent toward G-d [and] faithful in his religious duties." *Id.* The court's back-of-the-hand, "deserves little discussion," rejection of the Boy Scouts' efforts to claim the statutory religious educational facility exemption, *id.* at 1217, would appear to flow directly from the court's rule of statutory construction that "exemptions from remedial statutes should generally be narrowly construed." *Id.* at 1213.

There is no statutory refuge, therefore, for religiously inspired or affiliated entities in New Jersey deemed to fall beyond the narrowly construed confines of the exemption statute – or for religious institutions across the country in jurisdictions where there is no statutory exemption altogether.

However, there still may be *constitutional* refuge: the First Amendment's freedom of speech and freedom of association provisions, whether viewed independently or "in conjunction" with a free exercise claim under the *Smith* Court's "hybrid situation" doctrine, 494 U.S. at 881-82. (*See, e.g., Thomas* v. *Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999).) Like-minded religious practitioners are entitled to band together "for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984). And their freedom of speech includes "the autonomy to choose the content of [their] own message," including "what not to say." *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). If the decision of the court below is allowed to stand, though, these avenues of potential protection against efforts to compel a religious group's compliance with

religiously objectionable anti-discrimination provisions may also be foreclosed.

Several aspects of the constitutional analysis below portend jeopardy for religious groups that sponsor youth programs like those described in the first paragraph of this brief: the court's refusal to accept Boy Scouts' own interpretation of its own requirement that scouts be "morally straight" and "clean", *see* 734 A.2d at 1224 & n.12; the court's scornful disdain and legal rejection of the traditional view that homosexual conduct is immoral (*id.* at 1226-28; see also, and especially, Justice Handler's concurring opinion, *id.* at 1242-45); the court's bald conclusion that Boy Scouts' acceptance of a prominent homosexual activist in a role model position of scout leadership would not be "symbolic of Boy Scouts' endorsement of homosexuality", and that compelling Boy Scouts to do so does not constitute "forced speech". *Id.* at 1229.

These conclusions might well apply with equal force were a religiously-affiliated summer camping program to refuse to hire as a counselor, or a synagogue-sponsored youth group to refuse to engage as a leader, a person whose individual lifestyle may conform to contemporary notions of personal morality but flies in the face of the religious teachings of the sponsoring faith group. The camp and the youth program would likely have a hard time persuading a court following the New Jersey Supreme Court's lead that the purpose of their members' association is to disseminate messages about the religious propriety or impropriety of any given lifestyle. They would likely have a similarly hard time pointing to any specific language in their bylaws that speaks about such lifestyles. They would, in short, face legal hurdles substantially identical to the ones the Boy Scouts faced here.

Stated simply, the dangers of disallowing private entities like Boy Scouts of America from embracing their own

notions of moral propriety and role model fitness could have ramifications, especially in this era of limited free exercise protection, that threaten the religious independence of countless programs and institutions across the country.

Indeed, if current social trends are any indication, there may come a time when groups like the Boy Scouts may alter their perspective on the morality of homosexual conduct. Religious denominations like Orthodox Judaism, though – and the numerous other faith groups across this nation that do not regard *Leviticus* as irrelevant – are likely to remain stubborn holdouts. Our stake in an America that allows orthodox faiths to dissent from secular orthodoxies of the day is substantial and enduring, and leads us to raise our voice in support of the Boy Scouts' petition.

ARGUMENT

The petitioner's brief amply demonstrates that the decision below departs from this Court's established precedent and is in tension, if not outright conflict, with decisions of other lower courts.

If the Court grants the petition, *amicus curiae* Agudath Israel will offer its own independent analysis of the relevant case law. For now, though, mindful of the burden *amicus curiae* briefs impose on the Court, particularly at the petition stage of a proceeding, we simply adopt petitioner's argument as our own.

CONCLUSION

> "One particular stereotype we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of social science data that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in

> and contribute responsibly and positively to society... In short, a lesbian or gay person, merely because he or she is a homosexual, is no more or less likely to be moral that a person who is a heterosexual." 747 A. 2d at 1242-43 (Handler, J., concurring).

Were Justice Handler's morality lecture directed at those who regard persons with a homosexual *orientation* as inherently immoral, it would hardly be worthy of note. But it appears that His Honor has more on his mind, offering his comments in a case involving a sexually active homosexual for whom orientation is a license for conduct. Justice Handler's "renunciation" notwithstanding, millions of Americans still cling to the "myth" that sexual activity between two persons of the same gender is immoral, and that persons who engage in such conduct are not proper role models for youngsters. At stake here, in a fundamental sense, is whether our society still allows people to embrace such "mythology". The issue is important, and worthy of the Court's consideration.

For the reasons set forth in the Boy Scouts' petition, and as elaborated herein, *amicus curiae* Agudath Israel of America respectfully urges the Court to grant the petition and accept certiorari.

Respectfully submitted,

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